No. 18452

United States Court of Appeals
For the Ninth Circuit

TURF CENTER, INC., ALLEN A. GOLDBERG, MILTON HYATT and MYER MAYOR FOX, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

PETITION FOR REHEARING

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Appellants respectfully request a rehearing. Having re-examined the trial record and applicable statutory and case law in light of the opinion of this court, appellants urge the following grounds for rehearing.

Appellants' Specifications of Error Nos. 4, 5 and 6, all go to the insufficiency of the evidence to sustain conviction. The error was divided into three separate specifications to underscore that there was a different quantum of evidence with regard first to appellant Myer Mayor Fox, second with regard to appellants Allen A. Goldberg and Milton Hyatt, and third with regard to appellant Turf Center, Inc. Appellants urge that this court has not examined the distinctions imperative in these three separate specifications.

Further appellants, together, respectfully ask this court to rehear their combined claim as to the evidentiary insufficiency to support conviction. The court is urged to grant rehearing so as to give it an opportunity to consider appel-

lants' contention that the government failed to prove a knowing use by each appellant of a wire facility in interstate commerce coupled with an *intent* to facilitate a business enterprise involving gambling.

Appellants ask the court to re-examine the fact that they first commenced their business operation on May 16, 1962, the very date they were first cited for a violation of 18 U.S.C. 1952. Moreover, all four alleged violations took place within six days of appellants' commencement of business. In light of the requirement that a specific intent be proven, appellants urge this court to re-examine this point.

Appellants do not feel this court has fully considered the distinction between evidence to sustain a conviction on May 16, 1962, as opposed to May 22, 1962. By May 22, there had at least been six days' activity in which a course of conduct might have been established. But this is obviously impossible as of May 16, 1962. The court's opinion fails to reflect an appreciation of this distinction.

Appellants further urge the court to consider evidence to the effect that they had done nothing more than continue a business that had been conducted since depression days. It is urged that this court examine the necessary element of intent in light of this showing.

Also, has the court considered the evidence indicating Federal authorities had been investigating this business concern since September, 1961? No enforcement action was taken, however, until May 20, 1962, only six days after appellants purchased the business. This factor likewise bears directly on the crucial element of intent.

It is further respectfully urged that this court has not given complete consideration to the effect of the so-called "tolerance policy" (whereby city ordinances tacitly approve devices such as here involved) on the intent element.

Should not the court consider whether an individual has an intent to promote, manage, establish, carry on or facilitate an unlawful activity when the evidence has shown that the activity was not treated as unlawful in the locality in which it was conducted?

Appellants' Specification of Error No. 7 attacked the reference to state law in the instructions to the jury. These instructions advised the jurors that it was contrary to state law to engage in the sale of pull tabs and inferentially told them that this was tantamount to satisfaction of an element of 18 U.S.C. 1952. The point of this assignment was that the statutory language clearly rendered the phrase "in violation of the laws of the state in which they are committed" applicable only to prostitution offenses. The opinion indicates that the court did not consider the impact of these instructions in this light.

Appellants' Specification of Error No. 8 related to the failure to give a requested instruction to the effect that action taken in good faith or upon an honest, though mistaken, error in judgment is not criminal. What the lower court did instruct was practically to the contrary, namely that a person ordinarily intends the natural and probable consequences of his acts knowingly done or knowingly omitted.

We submit this court should more fully consider the adequacy of the instructions as given in light of the particular circumstances of this case. The jury was in effect told they could presume a criminal intent. But the evidence had shown appellants to have been in business for only six days at most and that they had merely continued an established business in a local environment in which the activity of the existing business was acknowledged, licensed, and taxed. It is respectfully suggested that the court might more fully consider all of these background factors and relate

them to the effect the instructions as given must have had on the jurors.

In Specification of Error No. 1, appellants attacked the constitutionality of Title 18 U.S.C., Section 1952, on the grounds that it violates both the due process clause of the Fifth Amendment and a portion of the Sixth Amendment of the United States Constitution for the reason that the statutory language is so vague as to not adequately inform them of the nature and the cause of the accusation. Appellants respectfully ask that this court reconsider its determination of constitutionality in light of the concept requiring strict construction of criminal statutes in favor of an accused.

Appellants further urge the court to rehear their arguments on this specification on a ground that the court perhaps has not yet considered. The court has commented, in its opinion, that each of the suspect words used in the legislation is not in and of itself vague or indefinite. Appellants urge that it is the combination of the several suspect clauses that render the statute, when taken together, as outside the required standard of clarity.

Specification of Error No. 2 attacks the constitutionality of Title 18 U.S.C., Section 1952, on the ground that it denies equal protection of the laws to certain citizens of the United States. Appellants urge the court to re-examine its opinion on the ground that the equal protection denial stems not only from a variation in state law but in a variation in the manner in which that state law is enforced in a particular state.

Specification of Error No. 3 attacks the counts of the indictment on which appellants were convicted as being obscure and vague in violation of Rule 7(c), Federal Rules of Criminal Procedure. Appellants respectfully request that

the court re-examine this point particularly in light of the opinion language that where a charge is framed in the conjunctive, the proof of any one of the allegations will sustain a conviction. Since appellants were charged with the carrying on of gambling or betting or wagering in violation of Title 9, Revised Code of Washington, Section 9.47.010 or 9.47.020 or 9.47.030 or 9.47.060 or 9.47.070 or 18 U.S.C. 1084, the government could have shown that they violated any of the cited statutes and thus met their burden of proof. Appellants' position is that requiring them to defend against all of these separate statutory provisions was patently violative of the procedural rule.

This court states that the charging in one count of the doing of a prohibited act in each of the prohibited modes redounds to the benefit of the accused. Appellants respectfully suggest that it cannot redound to their benefit when the language creates an accusation so broad as to be practically indefensible.

For the reasons as set out above, appellants respectfully petition this Honorable Court to rehear this matter.

Respectfully submitted,

MURRAY B. GUTERSON
Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that in my judgment this petition for rehearing is well founded and further that it is not interposed for purpose of delay.

MURRAY B. GUTERSON, *Attorney*